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NG MEE YEE & ANOR v. PP

COURT OF APPEAL, PUTRAJAYA
AHMAD ZAIDI IBRAHIM JCA
MOHD NAZLAN GHAZALI JCA
MOHAMED ZAINI MAZLAN JCA
B [CRIMINAL APPEAL: W-05(M)-128-03-2022]
10 FEBRUARY 2025

Abstract – *Knowledge and possession in drug trafficking can be inferred from a convergence of circumstantial evidence that would connect the accused to the drugs found in their exclusive domain, particularly when coupled with their reactions upon the discovery of the said drugs and the absence of credible alternative explanations.*

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CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused persons convicted for drug trafficking and sentenced to death – Drugs found in studio apartment unit occupied by accused persons – Whether knowledge could be inferred – Reactions of accused persons when drugs were found – Whether accused persons aware of existence of drugs – Whether conduct of accused persons during discovery of drugs supported presence of knowledge of drugs – Whether others had access to apartment – Dangerous Drugs Act 1952, s. 39B(1)(a) – Abolition of Mandatory Death Penalty Act 2023*

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Based on a police report alleging suspicion of the commission of an offence concerning counterfeit money, a team of police officers, accompanied by the second appellant, who was earlier arrested, had raided a studio apartment ('unit'). The door to the said unit was opened by the first appellant. Inside, the police discovered papers related to counterfeit money. A body search on the appellants revealed nothing incriminating. However, further inspection on the unit led to the discovery of substances, suspected to be drugs, in a blue packet placed in a void space next to the top shelf of the wardrobe. According to the police, the second appellant kneeled, cried and pleaded with the police team that the drugs were not his and asked that it not be seized. The appellants were then arrested. Upon analysis, the substances found were confirmed to be 777.3g of methamphetamine. The appellants were charged at the High Court, for trafficking in drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The possibility of access by others was found by the High Court to have been excluded in light of the findings that: (i) there were only two tenants in the said unit, namely the appellants; (ii) the appellants both showed positive result in the fitting exercise of trousers, shorts and t-shirts seized from the wardrobe in the unit; and (iii) there was no suggestion anyone else could have access to the unit and earlier placed the drugs at the space where it was discovered. The evidence of the reaction of the appellants was key and relied on by prosecution and accepted by the High

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Court as indicating knowledge of the existence of the drugs. At the conclusion of the trial, the appellants were found guilty, convicted as per the charge and sentenced to death. Hence, the present appeal. The stance in the appellants' appeal was that there was no exclusive possession, let alone knowledge of the drugs, based on the following: (i) the conduct of the appellants during the raid did not support the presence of knowledge on the part of the appellants of the drugs in the unit; (ii) the police fabricated the story that the second appellant knelt down and pleaded or cried upon the discovery of the drugs; (iii) the prosecution did not tender any evidence of the fingerprint or the DNA of the appellants to support an inference of knowledge on the part of the appellants or to exclude access to the drugs by the others or link the appellants to the drugs; (iv) the appellants were not aware of the existence of the drugs and that, crucially, they never saw the same since it was concealed and not visible; (v) the unit was owned by a Singaporean, who had a Bangladeshi national ('Alam') managing it. Without Alam produced as a witness, the appellants were deprived of the opportunity to examine on some very crucial questions; and (vi) the unit was dirty and had clothing belonging to other persons unknown, suggesting that others might have placed the drugs in the unit earlier, prior to the appellants moving in.

Held (dismissing appeal against conviction; substituting death sentence with life imprisonment)
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) The fact of the conduct of the second appellant, in kneeling, crying and pleading with the police team, justified the inference to be drawn therefrom, against the background of other evidence, to the effect that the appellants knew about the existence of the dangerous drugs in the wardrobe. This did not help the appellants' case, as it could also be interpreted that the second appellant knew about the drugs, only that he claimed that it was not his. As such, the reaction of the second appellant in kneeling down and pleading, and both of them in looking scared upon the discovery of the drugs were clearly admissible under s. 8 of the Evidence Act 1950 since it had a direct bearing on the fact in issue as the drugs were found and retrieved from the space adjoining the top shelf of the wardrobe used by the appellants as the only tenants in the unit. (paras 52 & 53)

(2) The testimony of the raiding police officer ('PW3') was credible and had no *mala fide* intention. There was no evidence that PW3, or any of the other policemen, including the investigating officer, had any reason to frame either of the appellants. The appellants too had never lodged any police report after their arrests to claim that they had been framed. What PW3 testified, including about the second appellant kneeling down, was not something inherently improbable such that his evidence should be

A accepted. Neither was his evidence seriously contradicted by other evidence or shaken by cross-examination, such that it ought to normally be accepted. (paras 55 & 56)

(3) Fingerprint and DNA evidence, if available, is often only supportive in nature. There is no rule of law that such evidence is mandatory to secure B conviction in drug possession or trafficking cases. In the absence of any fingerprint and DNA evidence, there was other evidence that warranted the connection between the appellants and the drugs. Not only were they the only tenants in the unit but they were also the only two who were in the unit when the drugs were found. There were no suggestions that C there were other tenants renting the same unit or that there were others in the premises when the drugs were seized. Neither were there specific suggestions that other individuals could have been present in the unit at an earlier point in time who could have placed the drugs there and whose DNA or fingerprints, in turn, could have been detected from the D packets containing the drugs. (paras 65-67)

(4) The blue packet was found in the wardrobe used by the appellants in that unit occupied by them. The items of clothing belonging to the appellants were placed in that wardrobe; the wardrobe was used by both they appellants. They could not have overlooked checking the top shelf of the E wardrobe if it was true that they had no knowledge of the drugs. If the drugs had nothing to do with the appellants, they could still have discovered the drugs earlier upon moving into the unit. Above all that, the weight of the drugs was not trifling, it was sizeable 777g of methamphetamine; it was obviously of a value considered not F insignificant. (paras 73-75)

(5) Just because certain known and unknown persons in the ordinary course of events could have something to do with the unit prior to its occupation by the appellants, it did not mean that they became material witnesses in this drug trafficking case without the appellants providing G some basis or foundation for their contention on the involvement of these persons. These were the kind of individuals that a potential tenant would ordinarily have to deal with anyways. In fact, the appellants never specifically alleged any of these persons, even Alam, could have placed the drugs in the space adjacent to the inside of the top shelf of H the wardrobe in the unit. (para 88)

(6) The assertion by the appellants, raised only at the defence stage, that the unit was dirty and had items of clothing which belonged to persons unknown, remained unsubstantiated. There was also not much substance in the contention of the appellants that, by the police not taking all the I clothing found in the wardrobe, but tested on the appellants only the ones recovered meant that the ones not taken belonged to other persons, and these other persons could, as such, have access to the unit and, by extension, to the drugs. Firstly, there was no requirement for the police

raiding party to seize all clothing from the crime scene in a drug trafficking case. Much depends on the facts. Secondly, the cloth-fit testing exercise was merely of evidential support and never determinative on its own. Thirdly, it was quite preposterous to suggest that the previous tenants, whomever they could have been, left behind their clothing and they still had access to come in and out of the unit to retrieve items of their belonging as they please. Fourthly, it was perplexing why the appellants could have agreed to rent the unit if it was true it was dirty and still contained clothes of the previous tenants, given that the appellants had earlier taken the trouble to move from another unit, which was said to be unsuitable to them for the same reason that made them move to the second unit; that the earlier unit was dirty. This argument was a convenient afterthought. (paras 100-104)

(7) The conviction ordered by the High Court, in relation to the charge against the appellants, was affirmed and the appeal against the said conviction was dismissed. In light of the coming into force of the Abolition of Mandatory Death Penalty Act 2023, which was subsequent to the order made by the High Court on both the conviction and sentence of the appellants, and taking into account the principles of sentencing and the applicable case law authorities, a commensurate, fair and reasonable sentence was to substitute the death sentence against the appellants with life imprisonment, specifically for the period of 30 years from the date of their arrests and, additionally, for the second appellant to be whipped with the minimum of 12 strokes. (paras 120 & 122)

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523; [1997] 1 BLJ 523 HC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] CLJU 17; [1956] 1 LNS 17 HC ***(refd)***
DPP v. Brooks [1974] 2 All ER 840 ***(refd)***
Fakhrurrazi Hasan v. PP [2017] 2 CLJ 125 FC ***(refd)***
Farose Tamure Mohamad Khan v. PP & Other Appeals [2016] 9 CLJ 769 FC ***(refd)***
Ghasem Hozouri Hassan v. PP [2018] 6 CLJ 133 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Jorge Crespo Gomez v. PP [2020] 8 CLJ 292 FC ***(refd)***
Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] CLJU 340; [1998] 1 LNS 340 HC ***(refd)***
Mat v. PP [1963] CLJU 82; [1963] 1 LNS 82 HC ***(refd)***
Muhd Zulkifli Abd Ghani v. PP [2012] 1 CLJ 293 FC ***(refd)***
Ong Ah Chuan v. PP & Anor [1980] CLJU 181; [1980] 1 LNS 181 ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Jitweer Singh Ojagar Singh [2014] 1 CLJ 433 FC ***(refd)***
PP v. Mohamed Ali [1962] CLJU 129; [1962] 1 LNS 129 HC ***(refd)***

A *PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(refd)***
PP v. Saimin & Ors [1971] CLJU 115; [1971] 1 LNS 115 HC ***(refd)***
PP v. Teh Cheng Poh [1979] CLJU 82; [1979] 1 LNS 82 HC ***(refd)***
Romi Amora Amir v. PP [2011] 1 CLJ 870 CA ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Tan Chun Cheng v. PP & Another Appeal [2020] CLJU 1089; [2020] 1 LNS 1089 CA ***(refd)***
B *Tang Teck Seng & Anor v. PP [2018] 10 CLJ 315 CA* ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 118, 180(1), 182A(2)
Dangerous Drugs Act 1952, ss. 2, 37(d)(da), 37A, 39B(1)(a), First Schedule
Evidence Act 1950, ss. 8, 32(1), 134
C Federal Constitution, arts. 5(1), 8
Penal Code, s. 34

For the 1st appellant - Chan Chee Wai; M/s CW Chan & Co
For the 2nd appellant - WC Chang; M/s Chiang Chambers
Shamaaraj Shanker Sangar & Yap Zhen Yun; M/s Kevin & Co
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[Editor's note: For the High Court judgment, please see PP v. Ng Mee Yee & Anor [2022] CLJU 1019; [2022] 1 LNS 1019 (affirmed in part).]

Reported by Najib Tamby

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JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] Both the appellants were accused of having committed the offence of F drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the DDA").

[2] The charge reads as follows:

> Bahawa kamu bersama-sama pada 11.10.2018, jam lebih kurang 12.25 pagi
G di premis unit 11-7, Taragon Time Service Unit, Jalan Changkat Thambi Dollah, dalam daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama telah mengedar dadah berbahaya iaitu methamphetamine seberat 777.3 gram. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca
H bersama di bawah seksyen 34 Kanun Keseksaan.

[3] The High Court had found both the appellants guilty and convicted them on the sole charge. They were sentenced to death.

[4] This was the appeal by the appellants against the said order of the High I Court.

[5] At the conclusion of the hearing of the appeal, we unanimously dismissed the same, for the reasons set out hereunder.

The Prosecution Case

[6] On 10 October 2018, based on a police report on a suspicion of the commission of an offence concerning counterfeit money, at about 12.25 in the morning, Inspector Govind Kumar a/l Asokumar, the raiding officer (PW3), led a team of police personnel, accompanied by the second appellant to Unit 11-7, Taragon Time Service Unit, Jalan Changkat Thambi Dollah, in the district of Dang Wangi Wilayah Persekutuan Kuala Lumpur ("the unit").

[7] On arrival, the door to the unit – a studio apartment – was found to be locked. It was then opened by the first appellant. PW3 introduced himself as a police inspector leading the team. The grill door was then opened by the first appellant. PW3 and his team entered the unit. They discovered some papers related to counterfeit money. A body search was conducted on both appellants but nothing incriminating was found.

[8] However, on further inspection of the unit, PW3 discovered a blue plastic packet written "VINDA DELUXE" in a space on the top part of a wardrobe in the bedroom area. After having unwrapped the blue packet, PW3 found one yellow plastic packet written "refined Chinese Tea". In turn, upon opening the yellow plastic packet, the police team discovered one transparent plastic packet which was suspected to contain the illegal drugs – methamphetamine. PW3 also found four glass cylinders (exh. P18A-D) on the wardrobe table, suspected to be used for drugs. Both the appellants were arrested.

[9] The raiding party then drove both the appellants and took the items recovered from the crime scene to IPD Sentul for further action, including ensuring the marking of items seized, the preparation of relevant forms, and getting the appellants to undergo urine test, before both the appellants being handed over to the investigating officer (IO) Inspector Norbariah Fazuan binti Ramli (PW4).

[10] All substances seized and suspected to be dangerous drugs discovered from the unit on 15 October 2018 were sent for analysis by PW4 to the Chemistry Department Malaysia. The chemist, Encik Rahman bin Mamat (PW2), testified, as confirmed in the chemist report (exh. P9), that upon the requisite analysis, the substance in the drugs found were methamphetamine weighing 777.3 grams, being the subject matter of the charge against the appellants. Methamphetamine is a dangerous drug listed in the First Schedule to the DDA.

Findings At The End Of The Prosecution Case

[11] The prosecution had called four witnesses to prove its case against both accused. The witnesses called by the prosecution were as follows:

(i) PW1 - Mohd Hafiz bin Rusli - police photographer;

(ii) PW2 - Rahman bin Mamat - chemist;

(iii) PW3 - Inspector Govind Kumar a/l Asokumar - raiding officer; and

(iv) PW4 - Inspector Norbariah Fazuan binti Ramli - investigating officer.

[12] At the end of the prosecution's case, in his analysis as to whether the prosecution had established a *prima facie* case against the appellants under s. 180(1) of the Criminal Procedure Code, and in line with the decision of the Federal Court in *Balachandran v. PP* [2005] 1 CLJ 85, the learned trial judge had, upon examination, found that the three key ingredients of the offence of drug trafficking – the existence of dangerous drugs as specified in the First Schedule to the DDA, the drugs was in the possession of the appellants who had trafficked in the same, as having been established.

[13] On the first element, the High Court accepted that PW2 is a qualified person who had undertaken a methodical analysis of the impugned drugs to determine its identity and weight in accordance with the rules and procedure issued by the Chemistry Department. The prosecution had proven the nature and weight of the impugned drugs, framing the subject matter of the charge. It was also determined that the drugs produced in court was the same drugs seized by the police during the raid since there was no fatal break in the chain of exhibits, applying the Court of Appeal case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551.

[14] In respect of the second ingredient, which is whether the appellants were in possession of the impugned drugs, the learned trial judge applied the decision of Thomson J in the leading case of *Chan Pean Leon v. PP* [1956] CLJU 17; [1956] 1 LNS 17; [1956] MLJ 237 on the subject of possession and found that it established that both the appellants had possession over the said drugs. Even though the first appellant asserted that she had given full cooperation to the police team when the raid took place, and did not attempt to dispose of the drugs, which she said she could have when she took the keys to open the grill, the High Court concluded possession was proved against the appellants.

[15] The learned trial judge relied on the evidence given by PW3 that there were no other persons except the first and second appellants who were in the unit at the time the raid arrest occurred. The fitting exercise of the t-shirt and trousers showed a positive match with both the first and second appellants, respectively. From the evidence of PW4, both the appellants were a couple in a relationship. Only they both had access to the unit, and thus possession over the impugned drugs.

[16] In addition, knowledge of the existence of the drugs on the part of the appellants was inferred by the High Court from especially the testimony of the raiding officer, PW3, who led the police team, who stated that both the appellants appeared scared and nervous at the time the raid was

conducted by the police party. PW3 testified that the second appellant even knelt down and begged the police not to arrest him immediately upon discovery of the drugs. Taking into account such evidence of conduct as explained in the decision of the Federal Court in *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19, the learned trial judge invoked the statutory presumption of possession under s. 37(d) of the DDA and concluded that the appellants had custody, control and knowledge of the impugned drugs which were found in the unit.

[17] As for the third element of trafficking, the learned trial judge made reference to the definition of trafficking in s. 2 of the DDA, which includes "keeping" or "concealing" which, given the evidence made available at trial, would apply to complete the ingredient of trafficking.

[18] In respect of the reference to s. 34 of the Penal Code in the charge against the appellants, the High Court also found that the prosecution had established common intention between the first and the second appellants, having regard to authorities on the subject such as the Court of Appeal decision in *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466; [2005] 4 MLJ 37 and the Federal Court case of *Farose Tamure Mohamad Khan v. PP & Other Appeals* [2016] 9 CLJ 769.

[19] As such, upon a maximum evaluation of the credibility of witnesses and reliability of evidence adduced, and following the approach stated in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393, the High Court ruled that the prosecution had successfully made out a *prima facie* case against the first and second appellants for the preferred charge of drug trafficking.

The Defence Of The Appellants

[20] Both the appellants were directed to enter their defence pursuant to s. 180 of the Criminal Procedure Code. They chose to give evidence under oath. They were their own respective witnesses. There were no other.

[21] The defence of the first appellant is essentially this. She admitted that she is the girlfriend of the second appellant. Her version of the relevant incident was that on 8 October 2018, the first and second appellants initially rented a room at unit 6-3B *via* online booking. However, they found that the room was dirty and felt uncomfortable to live in. Thereafter, they sought the help of the apartment's management agent, one Bangladeshi national by the name of Alam and requested for another, cleaner apartment unit.

[22] The following day, on 9 October 2018, Alam brought both the appellants to unit 11-7 in the same building and they discovered that the said unit was cleaner when compared to unit 6-3B. Nonetheless, they noticed the presence of some men's and women's clothes which were left hanging inside the wardrobe. Alam subsequently promised the appellants that his workers

would resolve the matter. Thus, the next day, the first and second appellants agreed to move into unit 11-7. However, they found that the clothing items were still hanging inside the wardrobe. They had yet to be removed, despite the promise by Alam.

[23] It was not long after, at about 12.25am on 11 October 2018, when the first appellant heard a knock on the door whom she thought was her boyfriend – the second appellant. She hurriedly opened the door and then the grill, but it was the police who entered the unit and raided the premises. The police team questioned her about the counterfeit money but thereafter found drugs on the top part of the wardrobe. The first appellant however denied knowledge, let alone having possession of the impugned drugs.

[24] As for the second appellant, he stated that he and his girlfriend – the first appellant – had on 9 October 2018, rented a room at unit 6-3B only to find that the unit was dirty. Both of them then requested to the management for a cleaner room and were shown unit 11-7 the next day. They agreed and did move in. That same day, at about 6pm, he went out to buy some food but was arrested by the police, who brought him to IPD Sentul, where he was informed that he was in possession of counterfeit money. He had to bring the police to his residence at unit 11-7, where upon inspection, the police team discovered the drugs in question. The second appellant denied that he knelt down and begged to be released on the discovery of the impugned drugs. He denied having possession and knowledge of the drugs.

Findings At The Close Of The Defence Case

[25] At the end of the defence case, the court found the prosecution had successfully proven a case beyond a reasonable doubt on the charge preferred against them. Hence, both accused were convicted and sentenced to death for the charge of drug trafficking.

Our Analysis & Findings On Appellants' Key Grounds Of Appeal

Whether Exclusive Possession Established

[26] The principal grounds of appeal and much of the argument advanced by both the appellants pertaining to the assertion that the High Court fell into the error of determining that the prosecution had shown that the appellants had not rebutted the presumption of possession of the drugs. The appellants however steadfastly maintained that they did not have possession of the same, in that they did not have exclusive custody and control over, let alone knowledge of the drugs found by the police in the space adjacent to the top shelf of the wardrobe in the unit.

[27] Thus, the crucial question, in the final analysis, on this element of possession is whether exclusive possession was correctly established by the learned trial judge. We were especially mindful that, as established by the Supreme Court in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1, the onus is

not on the defence to prove the possibility of access by others but on the prosecution to exclude such possibility, and the issue must be answered in favour of the appellants if there were more than one way in which the evidence adduced by the prosecution might be viewed.

Meaning Of Possession – Both Physical And Mental Elements

[28] In our view, however, it is imperative that the concept of possession in the context of drug trafficking laws be made clear. In the leading case of *Chan Pean Leon v. PP* [1956] CLJU 17; [1956] 1 LNS 17; [1956] MLJ 237, Thomson J said:

> "Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition pg 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

[29] In *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113, the Federal Court clearly held that having only custody or control over the drugs is insufficient to establish possession. The physical act or custody must be accompanied with evidence of knowledge. This again underscores the need to show the presence of mental element before possession can be proved. The Federal Court held:

> The law is well settled that having only custody or control over the said drugs is insufficient to establish 'possession'. The physical act or custody must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking.

[30] As such, it may be said that from the weight of authorities, possession, with both the physical and mental elements combined, can usefully be described as an accused being so situated to the proscribed drugs in that he has the power to deal with the drugs as the owner – to the exclusion of all other persons – and intends to do so in case of need. All these, including knowledge of the existence of the drugs, related to the intention to deal with the drugs (whether or not reliance is placed on the presumption under s. 37(d) of the DDA) must be proved either by direct evidence or circumstantial evidence to find possession.

[31] We must also stress that proof of proximity alone is insufficient to establish knowledge and therefore possession. The Court of Appeal in *Romi Amora Amir v. PP* [2011] 1 CLJ 870 concisely but clearly stated thus:

> Unless knowledge is proved, an item however close to a person, could just be miles away.

[32] What this means is that reliance on proximity alone to link an accused to the possession of the said drugs is insufficient. Here, in the instant case before us, the appellants were caught in the studio apartment unit they rented, where the drugs were discovered in a space next to the top shelf of the wardrobe in the bedroom area, giving rise to questions on whether the offending items were visible or concealed and whether others could have access to the same in the unit would be especially pertinent. Here, it is also not disputed by the defence that the appellants were the only two tenants of the unit when the police raided the same.

[33] Next, the true meaning of exclusivity of possession.

Exclusivity Of Possession – No Access By Other Parties – Must Be Shown

[34] We would, on the meaning of exclusivity in the context of possession in drugs cases, again refer to the judgment of Thomson J in *Chan Pean Leon v. PP* [1956] CLJU 17; [1956] 1 LNS 17; [1956] MLJ 237 where he also said the following:

> There remain, however, the question of possession and here I regret to have to say the Magistrate has failed to direct himself adequately as to the law. He has found that the accused had a physical power of disposal over the duplicates that he knew the duplicates were in the book in the basket and that he knew the nature of the duplicates. These facts, however, are not sufficient to support the inference of possession. No doubt he felt he was basing himself on the judgments of Gordon-Smith Ag CJ in the case of *Toh Ah Loh and MakThim v. Rex* [1948] 1 LNS 72; [1949] MLJ 54 and Spenser Wilkinson, J in the case of *Lee Boon Gan v. Regina* [1954] 1 LNS 39; [1954] MLJ 103. It is to be observed, however, that in both these cases the accused persons had actual physical control of the articles in question and that in both cases the Court was only concerned with the additional ingredients necessary to make possession criminal. Of course, there can be no possession without knowledge and there can be no possession without some power of disposal **but an essential ingredient of all possession is that there must be an intention as owner in case of need to exercise that power to the exclusion of other persons**.
>
> (emphasis added)

[35] In view of the Federal Court decision in *PP v. Denish Madhavan* [2009] 2 CLJ 209, it is now settled law that exclusive possession does not mean that possession needs to be exclusive to the accused only – in the sense that the prosecution must prove that only the accused must be in possession – because there can be joint possession, and many prosecutions have been pursued on that basis.

[36] It is, therefore essential to reiterate that the key question to fasten possession on an accused is whether in all the circumstances of the case, the accused is so situated *vis-à-vis* the drugs in question that he has the power to deal with the said drugs, as if they belong to him, to the exclusion of all other persons, and have the intention to do so should the need arise.

[37] In *Tang Teck Seng & Anor v. PP* [2018] 10 CLJ 315, the accused persons were found inside an apartment where drugs and firearms were recovered when it was raided by the police. On the charge for drug possession, they contended that they had no knowledge of the items in their apartment, and that there were others who came to the apartment, as shown in the visitors' registration book. The trial judge convicted them. The Court of Appeal reversed the finding of the High Court.

[38] The analysis by Mohd Zawawi Salleh JCA (as he then was) on exclusive possession merits reproduction, as follows:

> Exclusive Possession
>
> ...
>
> [44] Our courts have consistently held that possession must be exclusive. The term "exclusive possession" is not defined in the DDA 1952. Nevertheless, the courts have elucidated "exclusive possession" as follows:

> Thus, to sum up, the common usage, plain, natural and ordinary meaning of "exclusive" is "excluding or to exclude all others; not shared or divided". In the context of drug possession, "exclusive possession" can be construed to mean that the place where the drugs are found must be exclusive to the accused. However, possession of the drugs need not be exclusive. Possession may be joint, that is, two or more persons may jointly have possession of the contraband, exercising custody and control over it. In that case, each of these persons is considered to be in possession of that contraband" (per Mohd Zawawi Salleh, JC (as he then was) in *Public Prosecutor v. Tukiman bin Demin* [2008] 1 LNS 188; [2008] 4 MLJ 79).

[45] Thus, exclusivity must be proved by the prosecution. It is, therefore, incumbent on the prosecution to discharge this burden, and if there are gaps, the prosecution must close the gaps. It is not the defence duty to supplement the case for the prosecution.

[46] There was no sufficient evidence presented by the prosecution to infer that the appellants had the requisite knowledge. In *Fakhrurrazi Hassan v. PP* [2017] 2 CLJ 125, the facts are these: The accused was carrying a paper bag and in the paper bag was a towel and under the towel was a package wrapped in newspaper. In it was the prescribed drugs, that is three packets containing 2,681g of cannabis. On these facts, the Federal Court did not find knowledge. The Federal Court invoked presumption to find knowledge. His Lordship Ahmad Maarop FCJ (now CJM) said:

> When someone is caught carrying a bag containing package of dangerous drugs, the element of accessibility to the thing and the opportunity to inspect is invariably established because of his proximity to the bag and the packages. However, in the absence of additional evidence, for example of him taking a peek at the drugs, it does not necessarily mean that he must have knowledge of the drugs, unless there is a presumption in the law to warrant knowledge to be presumed, and indeed in our view, this is where the presumption under s. 37(d) of the Act may be called into play to presume knowledge of the nature of the thing in the bag.

[39] The instant case is not one about an accused carrying a bag containing drugs like in *Fakhrurrazi Hasan* (*supra*) but where the drugs were found in an apartment occupied by the accused, like in *Tan Teck Seng* (*supra*).

[40] Based on the petitions of appeals and submissions of the two appellants who are separately represented, their stance is that there is no exclusive possession, let alone knowledge, in light of the following considerations.

Conduct Of The Appellants

[41] The first issue raised by the appellants concerned the conduct of the appellants, especially that of the second appellant, who brought the police team to the unit which housed the drugs, and the first appellant, who unlocked the main door and the grill to let the police team into the unit, as

well as the conduct of both the appellants upon discovery of the drugs by PW3. The argument of the appellants is that their conduct did not support the presence of knowledge on the part of the appellants of the drugs in the unit.

[42] We do not think much could be said about the act of the second appellant, which led the police team to the unit. He had earlier already been arrested in the city by then; in other words, he had no choice and was plainly then under the control and direction of the police. Further, he was arrested for counterfeit money offences, not trafficking in drugs. He was being detained and investigated by the Commercial Crime Investigation Department of the Royal Malaysian Police, not the Narcotics Criminal Investigation Department.

[43] The second appellant also knew that the team went to the unit to gather more evidence of the offence of dealing in counterfeit money. In his witness statement, the second appellant said he knew that the police were looking for the printer used for counterfeiting activities. To such an extent, even if the second appellant knew about the presence of the impugned drugs in the space adjoining the top shelf of the wardrobe, he was probably quietly hoping for the police not to search, let alone discover the unit for unrelated items such as the drugs. In fact, PW3 did find a laptop and other items used for making counterfeit money at the workstation in the unit.

[44] But when the police team expanded their search to the bedroom area and then upon discovery of the drugs by PW3, it is PW3's evidence that the second appellant knelt down and begged the police not to take the drugs, protesting that they had no knowledge of it and nothing to do with it. At that point, as the first appellant was standing behind PW3, he could not see her immediate reaction. Subsequently though, PW3 testified that both looked scared. Such reaction suggested they could have knowledge of the presence of the impugned drugs.

[45] We are mindful that evidence shows that the first appellant cooperated with the police, did not dispose of the drugs when she went to get the keys to the grill after having opened the main door at the request of the police team, and did not kneel down begging like the second appellant. All these, according to the appellants, suggested she had no knowledge about the drugs.

[46] However, there is no evidence whether or not there is a window for her to throw the drugs out if she wanted to. The point is that the police team were already there in front of the unit. The second appellant too was with them. PW3 also introduced himself from the Commercial Crime Investigation Department. The first appellant must have known from the items in the unit particularly those at the workstation area, that the second appellant was handling counterfeit monies. Like the second appellant, the first appellant could have easily thought that the investigation on counterfeit

monies would not transform into a drug trafficking case. At the risk of repetition, PW3 did say he could not see the reaction of the first appellant as the latter was standing behind him when the second appellant knelt down on discovery of the drugs. But PW3 testified that subsequently both the appellants looked scared.

[47] This evidence of the reaction of the appellants is key and relied on by the prosecution and accepted by the High Court as indicating knowledge of the existence of the impugned drugs from where it was discovered. Counsel for both appellants strenuously argued that the second appellant kneeling and pleading, or both looking scared, did not mean they had anything to do with the drugs. For instance, it was argued that one who is detained upon discovery of dangerous drugs which was planted in one's apartment would probably have reacted in similar fashion.

[48] We observe at first blush that this reaction was not such an overt act by the appellants that could have more readily be construed as a sufficient basis for an inference of knowledge be made to be attributed to them, having regard to cases such as the Federal Court decision in *Parlan Dadeh v. PP* [2009] 1 CLJ 717, which stated the following:

> [36] The law relating to evidence of conduct is thus patent. *If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible*. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. *Conduct like the flight of an accused is a more positive act and is easily established*. On the other hand, conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. *The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance* (see *R v. Stephenson* [1904] 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage. However, the evidence admissible under the section must be confined to what is necessary for the purposes enumerated. *Illustration (c) to s. 9* explains the operation of this principle. It provides that when A is accused of a crime the fact that soon after the commission of the crime he absconded from his house is relevant. But the fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left, however, are not relevant, except in so far as they are necessary

to show that the business was sudden and urgent. If the explanation is accepted by the court then the inference arising from the conduct is rebutted. If it is not accepted or if the accused does not explain his conduct the inference remains unrebutted.

(emphasis added)

[49] The conduct in question was the appellant looking scared or nervous, which was more equivocal, and as to whether such conduct was influenced by any fact in issue or relevant fact under s. 8 of the Evidence Act 1950, it is useful to note that in *Parlan Dadeh* (*supra*), the Federal Court further made the following analysis, *albeit* in respect of the more overt conduct of running away:

[37] It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 which formed the basis of the submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *DPP v. Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself. On the other hand, in *DPP v. Brooks* [1974] 2 All ER 840 the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s. 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 is therefore authority only to this extent. On the other hand in *DPP v. Brooks* [1974] 2 All ER 840 there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s. 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s. 9.

[38] In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be

A validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *DPP v. Brooks* [1974] 2 All ER 840). It follows that the stand taken by the appellant in relation to the evidence of conduct is not sustainable ... .

B **[50]** It is self-explanatory from the above that in *Abdullah Zawawi Yusoff* (*supra*), there was no evidence to show that the act of the accused in running away was due to a relevant fact within the meaning of s. 8 of the Evidence Act 1950 because of the possibility of access to the house by others. In contradistinction, the conclusion was the opposite in *DPP v. Brooks* (*supra*) in C that the accused's conduct of running would have come within the contemplation of s. 8, given the evidence that the accused was in the driver's seat of a stationary van with several others. There were dangerous drugs in the van which when approached by the police, saw all of them bolted out of the van. In other words, in that situation, the drugs were in the physical custody and control of the accused, and there was no issue of possibility of D access to the drugs by others.

[51] Now, it bears emphasis that in the instant case before us, the possibility of access by others was found by the High Court to have been excluded in light of the findings that there were only two tenants in the said E apartment (the unit), namely the two appellants, and no other individuals were present in the unit when the drugs were recovered; that they both showed positive results in the fitting exercise of trousers, shorts and T-shirts seized from the wardrobe in the one bedroom studio apartment; and that there was no serious suggestion identifying anyone else in particular, who could have access to the unit and earlier placed the impugned drugs at the F space it was discovered.

[52] Therefore, the fact of the conduct of the second appellant in kneeling, crying and pleading with the police team (*albeit* denied by the appellants) justified the inference to be drawn therefrom, against the background of the G other evidence, to the effect that they knew about the existence of the dangerous drugs in that wardrobe in the unit. Also, according to PW3, the second appellant pleaded with the police that the drugs was not his and asked that it not be seized by the police. This does not quite help the case of the appellants, as it could also be interpreted that the second appellant knew about the drugs, only that he claimed it was not his.

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[53] As such, in the instant case, the reaction of the second appellant in kneeling down and pleading, and both of them in looking scared upon the discovery of the impugned drugs is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs were found and retrieved I from the space adjoining the top shelf of the wardrobe used by the appellants as the only tenants in the unit.

Credibility Of The Police Witnesses

[54] The second related factor that could militate against the finding of the High Court of exclusive possession is the appellants' assertion that the police fabricated the story that the second appellant knelt down and pleaded or cried upon the discovery of the drugs.

[55] We nonetheless agree with the finding of the learned trial judge that the testimony of the police raiding officer (PW3) was credible and had no *mala fide* intention against the appellants. We further noted that there was no evidence that PW3 or any of the other policemen, including PW4 (the IO), had any reason to frame either of the appellants. The appellants too had never lodged any police report after their arrests to claim that they had been framed. The police could not have, as they came to investigate a commercial crime offence but stumbled on a drug trafficking case.

[56] What PW3 testified, including about the second appellant kneeling down, is not something inherently improbable, such that his evidence should be accepted. Neither was his evidence seriously contradicted by other evidence or shaken by cross-examination, such that it ought to normally be accepted (see the decision of Thomson CJ in *PP v. Mohamed Ali* [1962] CLJU 129; [1962] 1 LNS 129; [1962] 1 MLJ 257).

[57] In addition, there was no evidence that either of the appellants had told the investigating officer (PW4) that they were framed by PW3. Even in their testimony in court, neither of the appellants put to any of the police witnesses that either one of them was out to frame them or had any reason to do so.

[58] We find that there is nothing inherently improbable in the evidence given by PW3 and PW4. In addition, the case of *PP v. Teh Cheng Poh* [1979] CLJU 82; [1979] 1 LNS 82 is, on this point, no less instructive where the High Court stated:

> Here I would reiterate that I had, of course without undue emphasis on demeanour alone, after seeing and hearing PW2 in the witness box, found him to be a witness of truth and had accepted his testimony as reliable. *I also considered that he was not an interested witness but was only a public officer who was only performing his duties and merely related to the Court what he actually saw and did on that day. His evidence was not contradicted by other evidence nor was he shaken in cross-examination and I also found that there was nothing inherently improbable about his evidence which was given on oath. Even if PW2 was an interested witness there is no legal presumption that he should not be believed unless there are cogent reasons for disbelief in the light of evidence to the contrary and the surrounding circumstances (Balasingam v. Public Prosecutor [1959] MLJ 193). There were no such cogent reasons or evidence to the contrary and the surrounding circumstances in this case do not show that PW2 should be disbelieved.* (emphasis added)

[59] Moreover, there is also no merit in the appellants' contention that the prosecution should have called another police witness' who participated in the raid of the unit to corroborate the testimony of PW3. We need only emphasise the trite principle that evidence is to be weighed and not counted. We state that it is so settled that under s. 134 of the Evidence Act 1950, no particular number of witness is required to prove any fact. The testimony of a single witness, if believed, is sufficient to establish any fact (see *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] CLJU 340; [1998] 1 LNS 340; [1998] 3 MLJ 457). The overarching principle to be emphasised is that evidence has to be weighed and not counted (see *Aziz Muhamad Din v. PP* [1997] 1 CLJ Supp 523; [1997] 1 BLJ 523; [1996] 5 MLJ 473).

Absence Of Corroborating Fingerprint Or DNA Evidence

[60] Thirdly, the appellants also argued that there is a gap in the prosecution case because the prosecution did not tender any evidence of the fingerprint or the DNA of the appellants that could be relied on to support an inference of knowledge on the part of the appellants or to exclude access to the drugs by the others, or in any meaningful fashion link the appellants to the impugned drugs.

[61] There was thus no corroborative evidence such as any fingerprints on the impugned drugs (or on the plastic packets in which the drugs was discovered) that could otherwise implicate the appellants.

[62] We do not disagree with the authorities cited by the appellants, such as in the case of *Tan Chun Cheng v. PP & Another Appeal* [2020] CLJU 1089; [2020] 1 LNS 1089; [2020] MLJU 782 the which had observed that fingerprint analysis and DNA matching are vital investigative tools that the police could utilise to establish control, custody and knowledge of the drugs by accused persons and to also rule out possession by others.

[63] However, here, the investigating officer (PW4) had given evidence that the dusting exercise on the seized drug items, more specifically the packets which contained the same, was not performed because the packets had an uneven surface ('tidak rata'), which in her experience would always produce invalid results.

[64] On this, we need only say that any evidence, or the absence of it, must be looked at in totality and in the proper context. We would also refer to the following passage from the judgment of the Federal Court in *Muhd Zulkifli Abd Ghani v. PP* [2012] 1 CLJ 293:

> [10] The Court of Appeal also concluded that the absence of the fingerprint evidence regarding the exhibits found in the van did not affect the prosecution case as there was ample other evidence to show that only the appellant and Eliah were found in the van driven by the appellant at the relevant time and that the appellant was also the owner of the said

van. We agree with the Court of Appeal, as there is no statutory provision requiring the prosecution to produce any fingerprint report especially when there is enough other evidence to connect the appellant with the drugs.

[65] Such fingerprint and DNA evidence, if available, is often only supportive in nature. There is no rule of law that such evidence is mandatory to secure conviction in drug possession or trafficking cases.

[66] In the instant case before us, in the absence of any fingerprint and DNA evidence, there is other evidence that warrants the connection between the appellants and the impugned drugs. They were the only two tenants in the unit. They were also the only two who were in the unit when the drugs were found by the raiding party. There were no suggestions that there were other tenants renting the same unit. Or that there were others in the premises when the drugs were seized.

[67] Neither were there specific suggestions that other individuals could have been present in the unit at an earlier point in time who could have placed the drugs therein and whose DNA or fingerprints in turn could have been detected from the packets containing the drugs. The said packet containing the drugs was itself found concealed in a space at the top part of a wardrobe used by the appellants.

Whether The Drug Was Visible

[68] The other factor which the appellants relied on to show their alleged absence of knowledge is the narrative that the appellants too were not aware of the existence of the drugs and that, crucially, they never saw the same since it was concealed and not visible to begin with.

[69] We observe nevertheless, the evidence of PW3, who found the drugs, that *albeit* the same was concealed in the sense of being placed in a void space next to the top shelf of the wardrobe, the blue packet containing the drugs was visible to PW3 when he looked up and opened the top shelf door of the wardrobe; which led him stand on a chair to check on the same more closely, as he was at that point still searching for items related to counterfeit monies.

[70] This resulted in the seizure of the blue packet containing the impugned drugs. In other words, PW3 testified that the blue packet was visible to him, which was why he climbed up to retrieve it.

[71] The appellants however pointed out that PW4 – the investigating officer who visited the crime scene, later gave evidence that without using a ladder or a chair, she could not see what was concealed in the void or space behind the air conditioner adjoining the top shelf of the wardrobe.

[72] We are of the view that PW4's evidence is still consistent with that of PW3 in that one would need to step on a chair or ladder in order to closely check any item lodged in that side void or space on the top shelf of the

A wardrobe, which is positioned behind the air conditioning unit. PW3's evidence is that whilst standing on the floor and looking up, he could already see a blue plastic item, which led him to climb up to examine it.

[73] Whilst some may argue that the visibility of the blue plastic packet might be dependent on the height of the person making the search, we think B that the more pertinent and undisputed point is that the blue packet containing the impugned drugs was in fact found in the wardrobe used by the appellants in that unit occupied by them.

[74] Evidence further shows that even though they had just moved into the unit, items of clothing belonging to the appellants were placed in that C wardrobe. In other words, the wardrobe was used by both the appellants. They could not have overlooked checking the top shelf of the wardrobe if it was true they had no knowledge of the drugs. After all, PW3 also said that the blue packet, which contained more than 700 grams of methamphetamine, was fairly sizeable and could be seen easily.

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[75] In other words, if the drugs had nothing to do with the appellants, they could still have discovered the drugs earlier upon moving into the unit. And above all that, the weight of the impugned drugs is not trifling – it is a sizeable 777 grams of methamphetamine. It is obviously of a value considered not insignificant. Why would anyone such as Alam, who helped E manage the administration of property rental there, or the person who helped the appellants moved their things to the unit, or any previous tenant, or any other unidentified person whom the appellants appeared to suggest could also have access to the unit (assuming it was true) want to leave behind such a valuable item, which PW4 testified to be worth about RM40,000? And F leaving the same behind with allegedly several items of clothing?

[76] As such, we agree with the conclusion of the High Court, which presumed custody and control as well as inferred knowledge of the drugs on the part of the two appellants.

G **[77]** We also wish to add, as an aside, purely out of interest but not having any bearing on our decision herein, in that from the appeal record, we note that after the discovery of the impugned drugs, PW3 found four glass cylinder bottles on the wardrobe table, which according to him were suspected to being used for drug consumption. If this was true, this could also H represent a certain nexus to the impugned drugs, further fortifying the inference of knowledge of the impugned drugs on the part of the appellants (although the appellants appeared to deny they had anything to do with these bottles). Nevertheless, the prosecution did not pursue this line of argument and neither did the High Court rely on the same in convicting the appellants. So, nothing more will be said about the bottles.

I

The Possible Involvement Of The Agent And Others Who Could Have Access But Did Not Give Evidence

[78] PW4 – the investigating officer – in her examination-in-chief testified that the unit is owned by a Singaporean who had a Bangladeshi national named Alam, managing it. Based on a letter from the immigration authorities tendered in court, Alam had flown back to Bangladesh some two months prior to the onset of COVID-19 and has not returned to Malaysia. PW4 was even able to contact Alam, who was out of the country to attend trial. He told her he was not ready to return to Malaysia given the uncertainty then on the outlook of the pandemic. This led to the prosecution applying to tender s. 112 statement earlier recorded from Alam, which was opposed by the defence.

[79] We agree with the learned trial judge that given the circumstances of this case, particularly the supervening COVID-19 pandemic, in light of the unavailability of the potential witness despite the efforts of the investigating officer, and notwithstanding her failure to procure Alam to execute the s. 118 bond (of the Criminal Procedure Code) or to issue him a subpoena to attend the criminal trial, the s. 112 statement of Alam tendered by the prosecution was correctly admitted by the High Court pursuant to s. 32(1) of the Evidence Act 1950. We only need to reiterate though that the weight to be given to this statement is a separate question altogether (see the Federal Court decision in *PP v. Jitweer Singh Ojagar Singh* [2014] 1 CLJ 433).

[80] The complaint of the appellants is that without Alam being produced as a witness due to the failure of PW4 to secure his attendance, the appellants were deprived of the opportunity to examine on some very crucial questions. After all, they dealt with Alam when they requested for the change of apartment by reason that the original unit offered to them was dirty. The appellants tried to show that based on their defence, Alam was aware of the state of the cleanliness of the unit, and that he got a couple of assistants to help move the things belonging to the appellants to the new unit, such that Alam could be examined on matters concerning access to the unit. In other words, even access by Alam and his assistants or cleaners could not be excluded such that mere occupation by the appellants cannot establish custody and control of the impugned drugs.

[81] The learned trial judge held that Alam was in any event not a material witness who could unravel the narrative of this case or answer questions in the mind of the defence. The role of Alam was not more than that of a house agent who assisted the appellants to find another suitable accommodation for them to occupy. The non-calling of Alam as one of the prosecution witnesses was not fatal to the prosecution's case.

[82] We agree that the High Court was not wrong in making this finding. It is observed that the evidence of PW4 (the investigating officer) was that based on the s. 112 statement recorded from Alam, the two appellants were the only individuals who had access to the unit. This assertion was indeed found in the s. 112 statement taken from Alam as tendered by PW4. This short one-and-a-half page s. 112 statement also stated that after having shown the new unit 11-7 to the appellants about after 11pm on 8 October 2018, both the appellants told Alam that the unit was "OK" but wished only to move the following day on 9 October 2018, which they did around 1pm.

[83] Alam had also acceded to their request for help to move their things from unit 6-3B by getting an assistant to do so. The keys to the unit's main and grill door were given to the appellants upon the second appellant paying cash of RM150 as a daily rental. The second appellant had told Alam the day before that they wished to stay there for a month but that he would be making daily rental payment.

[84] Some parts of the testimony of PW4 which related to what was allegedly told to her by Alam but not recorded in the s. 112 statement should be disregarded as being hearsay. For example, PW4 also testified that although not stated in the statement, Alam had also told her that the unit was not tenanted immediately prior to the two appellants moving in.

[85] We would, however, state that even if not expressly mentioned in the statement, the fact that Alam could immediately offer the unit for the appellant to move in straightaway must mean that it was not occupied immediately prior to them moving in. This would be so even though no tenant register was produced nor any online bookings list tendered to show whether or not the unit was immediately tenanted before the appellants moved in.

[86] Further, PW4 also did testify that Alam told her that there was a person who had helped the appellants to move their things from the originally tenanted room to the studio apartment they finally settled in. PW4, however, did not record the name of the person.

[87] The essence of the submissions of the appellants is on the failure by the prosecution to show exclusive possession, where the appellants had raised the possibility of other individuals – such as Alam; or other unnamed persons such as the person who had helped the appellants to move their things to the unit 11-7 from unit 6-3B; or the previous tenants of the unit; or the person, who allegedly could have custody of the keys to the unit (other than PW4).

[88] We must emphasise that just because these known and unknown persons in the ordinary course of events could have something to do with the unit prior to its occupation by the appellants, it does not mean they become

material witnesses in this drug trafficking case without the appellants providing some basis or foundation for their contention on the involvement of these persons. These were the kind of individuals that a potential tenant would ordinarily have to deal with anyway. In fact, the appellants never specifically alleged any of these persons, even Alam, could have placed the impugned drugs in that space adjacent to the inside of the top shelf of the wardrobe in the unit.

[89] In this regard, it would be incomplete if we do not refer to another pronouncement of our apex court on the issue of exclusive possession. The following passages on the issue of exclusive possession from the judgment of Raus Sharif CJ in the case of *Ghasem Hozouri Hassan v. PP* [2018] 6 CLJ 133 are especially instructive and self-explanatory:

> [27] Based on the pronouncement of this court in *Denis Mahadevan* as reproduced above, possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property. Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.*
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> ...
>
> [31] Thus, from the above, when we talk about the issue of custody and control, what is crucial is that the accused must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had *animus possidendi*). The intention to deal with the drugs here refer to the element of knowledge.
>
> [32] *We must not lose sight of the fact that more often than not the accused claims ignorance of the drugs to rebut/negate the element of knowledge. Thus, in the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.*
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> ...
>
> (emphasis added)

[90] It bears emphasis that it is already trite that a reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence (see *PP v. Saimin & Ors* [1971] CLJU 115; [1971] 1 LNS 115; [1971] 2 MLJ 16).

The Issue Of Clothing Of Others Left In The Unit

[91] We are mindful that the key finding of the High Court, accepting the case of the prosecution is that primarily because the two appellants were tenants of the unit and they were also the only ones present when the drugs were discovered in the void space next to the top of the wardrobe, they had custody and control of the impugned drugs, and knowledge was presumed under s. 37(d) of the DDA.

[92] Whilst this finding can usually be generally defended, the appellants argued that such a finding could not be justified as, firstly, the appellants only moved into the unit on the same day the police discovered the drugs in the unit. Secondly, at least one individual had been tasked by Alam to help the appellants to move their things into the unit, implying that exclusive access had not been established. Thirdly, as touched on earlier, it was claimed that there were still things which belonged to the previous tenants or other persons in the unit when the appellants moved into it, which Alam promised to remove.

[93] The appellants further submitted that PW4 also did not ask Alam about the rest of the clothes in the wardrobe, which did not belong to the appellants, as to who had cleaned the unit before they moved in and who had assisted them to carry their belongings from the sixth to the 11th floor. These were persons who, according to the appellants, could have been called to answer whether there was a previous tenant *vis-à-vis* the clothes left behind.

[94] Given these assertions, the defence attempted to argue that the prosecution had failed to discharge the burden of excluding access by others to the drugs found in the unit, especially during the period prior to, or just before the appellants moved into the same.

[95] The key stance of the appellants here is that the unit 11-7, despite them having agreed to rent it, was also dirty and had clothing belonging to other persons unknown. This contention is consistent with their argument that others might have placed the drugs in the unit earlier, prior to the appellant moving into – thus, the exclusive possession is again not established.

[96] In our judgment, the problem with this reliance on the narrative that the unit was also dirty with items of clothing of others left behind is that it was only surfaced by the appellants at the defence stage. The second appellant in his witness statement, for instance, stated "Pihak pengurusan telah menunjuk bilik 11-7 pada malam 9 Oktober 2018 dan kami hanya berpindah pada 10 Oktober 2018 kerana bilik 11-7 adalah juga kotor dengan pakaian orang lain bersama dengan benda-benda lain".

[97] The appellants' allegation that the studio apartment – the unit – was dirty and still had clothing belonging to others was never conveyed to the police when their statements were taken, and was also not raised during the

examination of the prosecution's police witnesses during the trial. In fact, the appellants did not even mention that there were clothing which belonged to others when the unit was searched by the raiding party, as when the police seized a number of clothing items for fitting exercise purposes.

[98] Moreover, Alam's s. 112 statement too did not mention the unit was dirty, whilst acknowledging the complaint of the appellants that the previous apartment 6-3B was.

[99] As this issue was introduced only at the stage of the defence, in our view, this supports the prosecution's submission that it was an afterthought.

[100] The assertion by the appellants raised only at the defence stage that the unit was dirty and had items of clothing which belonged to persons unknown remains unsubstantiated. The complaint raised by the appellants that PW4 failed to ask Alam for explanation about the alleged presence of such clothing in the unit is therefore entirely devoid of merit.

[101] We also do not think there is much substance in the contention of the appellants that by the police not taking all the clothing found in the wardrobe, but fit tested on the appellants only the ones recovered meant that the ones not taken belonged to other persons, and these persons could as such also have access to the unit – and by extension, to the drugs.

[102] We say so for a number of reasons. First, there is no requirement for the police raiding party to seize all clothing from the crime scene in a drug trafficking case. Much depends on the facts. Secondly, the cloth-fit testing exercise is merely of evidential support and never determinative on its own. Thirdly, it is quite preposterous to suggest that the previous tenants, whoever they could have been, left behind their clothing and they – the previous tenants, still had access to come in and out of the apartment to retrieve items of their belonging as they please.

[103] Fourthly, it is also perplexing why the appellants could have agreed to rent this unit 11-7 (as identified by Alam) if it was true it was also dirty and still contained clothes of the previous tenants, given that the appellants had earlier taken the trouble to move from the apartment 6-3B, which in evidence was said to be unsuitable to them for the precise same reason that made them move to the second apartment 11-7; that apartment 6-3B was dirty. This lends further credence to the earlier finding that this argument is a convenient afterthought.

[104] There is as such no justification to contend as the appellants did that the clothes were not taken for fitting exercise because they belonged to other unknown individuals.

[105] In light of the above, it can be safely concluded that the appellants then had the power to exclude other persons from the enjoyment of the property, for that at all material times, the offending drugs was in their custody and control. The irresistible inference that must accordingly be drawn is that both

A the appellants all along must have known about the drugs found in that space in the top shelf of the wardrobe in the unit occupied by them. For completeness, we also state that given the facts of the case as analysed above, there is no ambiguity in the application of s. 34 of the Penal Code in the charge against the appellants, for we agreed that the High Court had correctly
B found that the prosecution had established common intention between the first and the second appellants, in light of authorities such as *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466; [2005] 4 MLJ 37 and *Farose Tamure Mohamad Khan v. PP & Other Appeals* [2016] 9 CLJ 769.

Did The High Court Invoke Double Presumption?

C **[106]** One other grievance of the appellants is that the High Court had invoked a double presumption to convict the appellants. They submitted that this was because of the learned trial judge's reliance on s. 37(d) of the DDA on the presumption on possession and on the provision of s. 2 of the same Act in respect of the definition of "trafficking".

D **[107]** We find no merits in this contention. Whilst s. 37(d) is a statutory presumption, the definition of "trafficking" in s. 2 is certainly not. This instant case involves a finding of trafficking made by the learned trial judge based on direct evidence. We are of the view that the following passages of
E the judgment of the High Court is clear on the point, whereby firstly, at the end of the prosecution case:

> [33] At this juncture, I invoked the statutory presumption under s. 5 37(d) of the Act to establish that the first and the second accused had possession of the impugned drugs found in the said premises and had knowledge of the same. This together with the definition of trafficking in
F s. 2 of the Act which includes "keeping" or "concealing" completes the ingredients of the offence.

[108] And later, at the end of the case:

> [62] In the totality of the evidence, I find that the prosecution has
G successfully proved its case beyond reasonable doubt against the first and second accused. For the aforesaid reasons, I find both accused have failed to raise a reasonable doubt in the prosecution's case and have failed to rebut the presumption of possession stated in s. 37(d) of the Act on a balance of probabilities. I find the first and second accused guilty as per the charge preferred against them and I convict them ... .

H **[109]** We should emphasise that present laws provide that for the purpose of seeking to establish the elements of possession and trafficking in the offence of drug trafficking under s. 39B of the DDA, the prosecution has the option of invoking only either one of the presumptions of possession under s. 37(d) or the presumption of trafficking under s. 37(da) of the same Act.

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[110] This is because in a landmark decision, the Federal Court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 ruled that s. 37A of the DDA on the use of double presumptions of possession and trafficking to secure a conviction under s. 39B(1)(a) of the Act was in violation of arts. 5(1) and 8 of the Federal Constitution on the right to life and liberty and is therefore unconstitutional. The Federal Court has also reiterated this position in *Jorge Crespo Gomez v. PP* [2020] 8 CLJ 292.

[111] The court must therefore clearly make a finding whether reliance is placed on 'direct evidence' or the statutory presumption (regardless of whether the presumption is for possession or for trafficking) to ensure a fair trial to the accused, given that the invocation of a statutory presumption casts on the accused the burden of rebutting the same on a balance of probabilities instead of merely raising a reasonable doubt on the prosecution case if there is no such presumption.

[112] In the former situation, the defence bears the burden of rebutting the respective presumptions as may be applicable to prove the contrary on a balance of probabilities. However, if the prosecution decides not to invoke the presumption of possession under s. 37(d), it is incumbent upon the prosecution to adduce evidence so as to establish that the accused had possession of the dangerous drugs independent of the statutory presumption. In the instant case, the learned trial judge invoked the presumption of possession under s. 37(d) when calling for the defence of the appellants, and found sufficient evidence of the appellants trafficking in dangerous drugs within the meaning as defined in s. 2 of the DDA.

[113] Furthermore, even if the statutory presumption of trafficking is not invoked (like not done presently), case law authorities in any event hold that generally, the larger the quantity of the drugs, the stronger the inference that they are not intended for personal consumption of the person carrying them, but for trafficking, and the more convincing the evidence needed to rebut it (see the Privy Council decision in *Ong Ah Chuan v. PP & Anor* [1980] CLJU 181; [1980] 1 LNS 181; [1981] 1 MLJ 64).

[114] There is no dispute that in the present appeal, evidence such as from the witnesses, including the police witnesses and even the appellants themselves, demonstrate that the impugned drugs was kept or stored, if not concealed in the space behind the air conditioning set adjoining the top shelf of the wardrobe, thus fulfilling the definition of trafficking in s. 2. Based on the definition of trafficking in s. 2 of the DDA, which stipulates 18 acts which constitute trafficking, "keeping" or "concealing" or even "storing" are only three of them. Section 2 of the DDA defines "trafficking" as including:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending,

A delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act;

[115] There is therefore no double presumption in this case.

B **Conclusions**

[116] In light of our analysis as discussed above, we found that the grounds of appeal against their conviction as raised by the appellants to be devoid of merits. There were no defects in the findings of the learned trial judge that the defence had failed to rebut the statutory presumption of possession under C s. 37(d) of the DDA on the balance of probabilities and failed to raise any reasonable doubt in the prosecution's case.

[117] We unanimously agreed that the prosecution had successfully proven their case beyond a reasonable doubt pursuant to s. 182A(2) of the CPC and s. 34 of the Penal Code against both the appellants.

D **[118]** Our examination of the appeal record and consideration of the submissions of the parties did not disclose that the learned trial judge tried the case in a fashion other than by correctly examining the defence evidence and evaluating the entirety of the evidence at the conclusion of trial and by applying the requirements of the governing law, such as stated by the Federal E Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, which followed *Mat v. PP* [1963] CLJU 82; [1963] 1 LNS 82; [1963] 1 MLJ 263. We found no merits in this appeal.

[119] Applying s. 182A of the CPC, and having regard to the totality of the evidence in this case, we could not disagree with the learned trial judge that F the defence of the appellant had failed to rebut the presumption of possession on a balance of probabilities and failed to raise a reasonable doubt on the prosecution's case. The prosecution had, therefore, proved its case against the appellant beyond a reasonable doubt in respect of the charge framed against the appellants. The conviction is safe.

G **[120]** Accordingly, the conviction ordered by the High Court in relation to the charge against the two appellants was affirmed and the appeal against the conviction, dismissed.

[121] As for the appeal against the sentence of death by hanging, which had H been meted out by the High Court on both the appellants, since the appellants did not submit on the same at the hearing of the appeal (and neither did they include it in their respective written submissions), we invited counsel for the appellants to submit on their appeal against the sentence before us.

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[122] After hearing the mitigation submissions made by counsel for both the appellants who requested for the death sentence ordered against them to be substituted with life imprisonment, and considering the submission of learned DPP who did not object to the substitution as prayed for, we arrived at the decision that in light of the coming into force of the Abolition of Mandatory Death Penalty Act 2023, which was subsequent to the order made by the High Court on both the conviction and sentence of the appellants, and taking into account the principles of sentencing and the applicable case law authorities, a commensurate, fair and reasonable sentence is to substitute the death sentence against the two appellants with life imprisonment, specifically for the period of 30 years from the date of their arrests (as not objected to by learned DPP), and additionally, for the second appellant (but not the first appellant, being a female) to be whipped with the minimum 12 strokes.